No. 95-388

In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball League Players Association respectfully move for leave to file the accompanying brief as amici curiae in support of Petitioners. Petitioners have consented to the filing of the brief; Respondents have not.

INTEREST OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION

The NHLPA, NFLPA, MLBPA and NBPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL"), National Football League ("NFL"), Major League Baseball, ("MLB") and National Basketball Association ("NBA"). As a result, they are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision of the United States Court of Appeals for the District of Columbia Circuit.

The NHLPA, NFLPA, MLBPA, and NBPA's analysis of the practical significance and consequences of the decision below thus provides an important perspective which they believe will assist the Court. As representatives of unionized employees in professional team sports, in which bargaining over salaries and other significant terms of employment is reserved by the unions for individual employees, they have a unique familiarity with collective bargaining and the application of the nonstatutory labor exemption in this context. As set forth in the accompanying amicus brief, they are concerned that the decision of the court below will severely damage both labor and antitrust policies and will, if not reversed, significantly impede the ability of employers and employees in professional team sports, entertainment and similar multi-employer industries to reach collective bargaining agreements.

In submitting the acompanying amicus brief supporting the Petitioners, the NHLPA, NFLPA, MLBPA, and NBPA wish to explain how, based on their experience, the decision below adversely affects both antitrust policy and collective bargaining. They believe that this perspective will assist the Court in its consideration of this case

and therefore respectfully move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Asociation, National Football League Players Association, Major League Baseball Players Association and National Basketball League Players Association respectfully move for leave to file the accompanying brief as amici curiae in support of Petitioners. Petitioners have consented to the filing of the brief; Respondents have not.

INTEREST OF AMICI

The National Hockey League Players Association ("NHLPA"), National Football League Players Association ("NFLPA"), Major League Baseball Players Association ("MLBPA") and National Basketball Players Association ("NBPA") are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL"), the National Football League ("NFL"), Major League Baseball ("MLB") and the National Basketball Association ("NBA"). Each of these amici are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below. Further, the employee members of *amici* have repeatedly been the targets of anticompetitive restraints unilaterally imposed by their employers, seeking to eliminate the competition over individually negotiated salaries and other terms of employment which the unions in these industries have preserved for their members. Accordingly, *amici* have a strong interest in the Court's resolution of the extremely important questions of antitrust and labor law policy presented by this case.

SUMMARY OF ARGUMENT

The decision below, which vastly expands the scope of the non-statutory labor exemption, purports to do so in order to strike an "accommodation" between the antitrust laws and the labor laws. In reality, the decision has exactly the opposite effect. By completely ousting the antitrust laws from unionized labor markets, the "new" labor exemption constructed by the Court of Appeals seriously damages both antitrust and labor law policies. It permits employer cartels in such industries to violate the antitrust laws with impunity and, at the same time, completely undermines multi-employer collective bargaining. This is particularly true in industries like professional team sports and entertainment, in which the unions have exercised their rights under the labor laws to leave the

negotiation of salary and other significant terms of employment to individual bargaining.

The real life experience of *amici* and their members demonstrates the severe and adverse consequences to antitrust and labor law policies which directly flow from such an overbroad antitrust exemption. When employers in professional team sports have claimed to be shielded from antitrust scrutiny for their unilateral imposition of labor market restraints, the result has been lockouts, strikes, and union decertifications. Indeed, the recent labor turmoil in professional basketball and baseball, as well as the three year decertification of the players union in professional football, can all be linked directly to efforts by the employers in those industries to claim antitrust immunity for unilaterally imposed restraints on competition over employment terms reserved for individual player bargaining. By contrast, when the antitrust laws have been properly applied to unionized labor markets in professional team sports, history shows that collective bargaining has been successful and resulted in compromises of employer and employee interests which resulted in labor peace.

To prevent the decision below from undermining both antitrust and labor law policies, this Court need only apply its own historic rationale for the non-statutory labor exemption for restraints on substantive employment terms: to protect certain union-employer *agreements*, in order to effectuate the employee-organizing objectives of the statutory labor exemption. There is nothing in the National Labor Relations Act, or in any precedent of this Court, to support the conclusion that labor policy requires the implication of an antitrust exemption to protect the desire of employers, in industries in which individual bargaining has been preserved, to eliminate competition among themselves for the services of such employees.

By properly limiting the scope of the non-statutory labor exemption to the terms of employment contained in union-employer agreements, both antitrust and labor law

objectives will be served. Employees will no longer be forced by the decision below to abandon collective bargaining to assert their antitrust rights; and an implied antitrust immunity will be properly limited to only that narrow area where a "clear repugnancy" between the antitrust and labor laws exists.

ARGUMENT

I. THE EXPERIENCE IN PROFESSIONAL TEAM SPORTS DEMONSTRATES THAT THE VASTLY EXPANDED ANTITRUST EXEMPTION CREATED BY THE DECISION BELOW SEVERELY UNDERMINES BOTH ANTITRUST AND LABOR LAW POLICY

This case involves an agreement by the employer-members of an industry-wide, multi-employer bargaining unit to completely eliminate the individual competition over wages which the NFL players union has lawfully preserved for its members. There is no dispute that such an agreement by employers to eliminate all wage competition in a labor market would violate the antitrust laws if not subject to some special antitrust exemption. The Court below implied such an unlikely exemption, for employers to cartelize their labor markets, from the National Labor Relations Act, based on its belief that multi-employer, collective bargaining would be severely damaged if the antitrust laws apply. In fact, the experience of professional team sports demonstrates that just the opposite is true. Permitting competing clubs unilaterally to impose anticompetitive restraints without antitrust review has severely disrupted union-employer relations in these sports, while the application of the antitrust laws to scrutinize such anticompetitive agreements has facilitated stable and productive collective bargaining.

In 1965, this Court recognized the existence of a non-statutory (*i.e.*, implied) labor exemption to cover certain "union-employer agreements" for the purpose of "accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local No. 189, Amalagamated Meat*

Cutters v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *see also United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). For more than two decades, the lower courts adhered to the principles of *Jewel Tea* and *Pennington* and only applied the non statutory labor exemption in professional team sports to restraints contained in union-employer agreements. In particular, the courts were careful not to permit the exemption to be used by competing sports team owners as a shield for unreasonably anticompetitive restraints imposed against the will of their employees. Such restraints, enforced by the power of sports commissioners to severely punish teams who depart from league rules, were generally found by the lower courts to violate the rule of reason because they were found to be far more restrictive than reasonably necessary to achieve any legitimate objective.[1] The result, for almost twenty-five years, was a careful accommodation of antitrust and labor law policies in the non-statutory labor exemption, in which unilaterally-imposed unreasonable restraints of trade were prohibited, while successful multi-employer bargaining---yielding compromise agreements in which some restraints were continued, but others

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[1] *See, e.g., Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp* v. *National Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Robertson* v. *National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Linseman* v. *World Hockey Association*, 439 F. Supp. 1315 (D. Conn. 1977); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal.), *injunction reinstated sub nom., Haywood* v. *National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, J.) (restraints on competition for players imposed by owners without union agreement found to violate the rule of reason). Reasonable restraints imposed by sports leagues, however, have been upheld. *See Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

were eliminated—was able to take place. By contrast, the purest example of the repeated disruptions in labor relations which occur in professional team sports when employers believe that they can unilaterally eliminate competition over individually negotiated contracts without antitrust scrutiny is provided by professional baseball, where the anomalous antitrust exemption for Major League Baseball's reserve clause, not the non-statutory labor exemption, has been in effect. *See Federal Baseball Club v. National League*, 259 U.S. 200 (1922); *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

The first application of an expanded non-statutory labor exemption, for restraints imposed without union agreement, occurred in 1989 as a result of the Eighth Circuit's decision in *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied* 498 U.S. 1040 (1991), which held that restraints contained in an expired collective bargaining agreement ("CBA") would continue to be protected by the exemption as long as there was a union in place. The exemption was then expanded even further by the decision of the Second Circuit in *National Basketball Ass'n* v. *Williams*, 45 F.3d 684 (2d Cir. 1995) (petition for a writ of *certiorari* pending), and the decision of the Court of Appeals below, which extended antitrust immunity to *any* restraints on competition imposed by multi-employer bargainers in a unionized labor market (whether or not a union ever agreed to them). The combined effect of these decisoins has been to cause havoc to labor relations in professional team sports, where unions have always preserved their members' rights to individually negotiate employment contracts. The consequences, as discussed below, are devastating for both antitrust and labor law policies.

A. Professional Football

Professional football provides one of the most dramatic examples of how an overbroad non-statutory labor exemption can undermine multi-employer collective bargaining,

particularly in industries like professional team sports, while a narrow exemption, carefully limited to union-employer agreements, can promote both antitrust and labor law policy. Specifically, prior to the Eighth Circuit's decision in *Powell,* NFL clubs were unable to impose unreasonbale restraints on competition for players without union agreement, due to the application of the antitrust laws, and the result was the successful negotiation of compromise collective bargaining agreements ("CBA"). By contrast, after the non-statutory labor exemption was expanded in *powell* to shield the NFL clubs' unilateral imposition of anticompetitive restraints that the union had not agreed to, the NFL players were forced to renounce all collective bargaining in order to protect their antitrust rights.

Prior to 1989, the NFL clubs on several occasions, imposed unreasonable restraints on competition in the labor market without union agreement, but the lower courts consistently limited the non-statutory labor exemption to its proper confines and applied the antitrust laws to strike down these unreasonable restraints. *See, e.g., Smith* v. *Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp* v. *National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). In that context, the NFL clubs thus came to realize that they could not unilaterally impose such restraints, and the collective bargaining relationship improved. As a result, in 1977, and, again, in 1982, the NFL players and owners were able to negotiate successive five year CBAs (with the players getting certain improvements, but agreeing to continue various restraints for a limited period of time).

In 1987, however, the NFL clubs' determination to continue what turned out to be extremely severe restraints on the market for player services, under a claim of antitrust immunity, made it impossible for the players and owners

to engage in productive collective bargaining. Under the two CBAs that were in effect during the ten years prior to the 1987 season, only one NFL player who was subject to draft choice compensation moved to another team at the expiration of his player contract, even though thousands of players supposedly were eligible to market their services to other teams under the "right of first refusal/compensation" rules of the expired CBA. The NFLPA attempted to negotiate a new CBA in which players would have the opportunity to market their services to NFL clubs without unreasonable restriction. The NFL clubs refused and, as a result, the football players engaged in a brief unsuccessful strike.[2]

Thereafter, the NFL clubs—competitors in the market for player services—continued to impose, over the union's objection, various unreasonable restraints in that market. A group of NFL players and the NFLPA commenced an antitrust class action against the NFL and its clubs, to challenge the continued unilateral imposition of these unreasonable restraints on competition for player services. *Powell* v. *National Football League*, No. 4-87-917 (D. Minn. 1987) (Doty, J.) The district court in *Powell* held that a multi-employer groups' continued imposition of unreasonable restraints contained in an expired CBA were not shielded by the non-statutory labor exemption after an "impasse" had been reached in the negotiations over a new agreement. *Powell* v. *National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988). On November 1, 1989, however, a divided panel of the United States Court of Appeals for the Eighth Circuit reversed, holding that the non-statutory labor exemption from the antitrust laws immunizes anticompetitive restraints previously agreed to in an expired CBA as long as there is a continuing "labor relationship." *Powell* v. *National Football League*,

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[2] The NFL used "replacement" players in games that were broadcast by the television networks, and, after four weeks, the players reported back to work without a new CBA.

930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

As a direct result of the Eighth Circuit's decision in *Powell*, the NFL players were faced with the Hobson's choice of either surrendering their antitrust rights to challenge the employer-imposed unreasonable restraints, or giving up their labor law rights to engage in collective bargaining and other union-related labor activities. Forced to make this choice, the NFL players overwhelmingly voted, in November of 1989, to renounce their collective bargaining rights, effectively terminating the NFLPA as their collective bargaining representative. Individual NFL players then commenced new suits against the unreasonable labor market restraints imposed by the NFL and its clubs, in which the players asserted their individual rights under the antitrust laws. *See, e.g., McNeil* v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992); *Jackson* v. *National Football League*, 802 F. Supp. 226 (D. Minn. 1992).

Beginning with the 1989 season, the NFL clubs implemented "Plan B," which continued an anticompetitive right of first refusal/compensation system for the vast majority of players and significantly reduced player benefits.[3] Plan B also threatened to eliminate individual bargaining by players altogether, and to implement a leaguewide wage scale covering all players beginning with the 1993 NFL season. For four consecutive seasons, from 1989 to 1992, the NFL players suffered the adverse effects of Plan B, without any collective bargaining or labor law rights.

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[3] In addition to imposing unreasonable restraints in the market for player services, Plan B attempted to terminate and replace the players' collectively bargained pension plan; terminated the accrual of severance; froze playoff money; froze injury protection pay for veterans and reduced it for rookies; froze termination pay; lowered minimum salaries; reduced life, health and dental insurance; froze expansion bonuses; and froze pre-season player per diems.

In September 1992, after a three-month trial, the jury verdict in *McNeil* found that the NFL's right of first refusal/compensation restrictions were unreasonable restraints of trade in violation of § 1 of the Sherman Act. Subsequently, a new class action was filed on behalf of all NFL players, challenging the continued implementation of these or similar unreasonable restraints on competition for player services. *White* v. *National Football League*, No. 4-92-906 (D. Minn. 1992). In January 1993, faced with the prospect of an imminent preliminary injunction decision in *White*, the NFL and its member clubs agreed to a global settlement of the *White* class action and other player suits which granted NFL players, for the first time, the opportunity to be unrestricted free agents (at present, after four years of NFL service). The NFL clubs also agreed to pay out a total of $195 million to settle class actions and the more than twenty different player lawsuits filed against them. In exchange for these substantial benefits, the players compromised by agreeing to a salary cap system (limiting, in accordance with specified rules, the total amount of salaries for each NFL team).

It was only in the Spring of 1993—following the *White* antitrust settlement and more than three years after the decertification of the NFLPA—that a majority of NFL players signed authorization cards to reconstitute their union, and collective bargaining resumed. On May 6, 1993, the NFL clubs and the NFLPA agreed to a new CBA which among other things, incorporated the free agency/salary cap system of the *White* settlement and provided for long-delayed increases in pension, termination pay, playoff money and other benefits for players. Just this past December, the NFLPA and the NFL clubs announced a proposed extension of their collective bargaining agreement until at least the year 2000.

The experience of professional football in the wake of *Powell* provides a stark example of how collective bargaining is completely destabilized by an overbroad inter-

pretation of the non-statutory labor exemption. The clubs' unilateral imposition of anticompetitive restraints in the belief that they were protected from antitrust scrutiny resulted first in labor strife and then in union decertification. Neither result served any conceivable national labor policy. If not for the application of the antitrust laws to owner-imposed, unreasonable restraints in *McNeil* and *White*, the NFL players would still have no union, and multi-employer bargaining would have no place in professional football.

B. Professional Basketball and Hockey

The history of collective bargaining in professional basketball and hockey also demonstrates that the application of the antitrust laws to unreasonable labor market restraints imposed without union agreement serves both antitrust and labor law objectives. In each sport, when the multi-employer group has unilaterally implemented unreasonable anticompetitive restraints, believing itself to be immune from the antitrust laws, the result has been a disruption in labor relations. Applying the antitrust laws to employer-imposed restraints, by contrast, has fostered collective bargaining.

Professional basketball never experienced a work stoppage prior to the 1994 decision in *Williams*, which held the antitrust laws inapplicable to all unreasonable restraints imposed by the members of a multi-employer bargaining group, as long as the employees in that industry are represented by a union. Prior to that time, when NBA clubs had unilaterally imposed anticompetitive restraints on the market for player services, those restraints had been scrutinzed under the antitrust laws. *See Robertson* v. *National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (holding that various restraints on competition for players which were imposed without union agreement, were not covered by the non-statutory labor exemption and were likely to constitute antitrust violations). *See also Denver Rockets* v. *All-Pro Manage-*

ment, Inc., 325 F. Supp. 1049 (C.D. Cal.), *injunction reinstated sub nom. Haywood* v. *NBA*, 401 U.S. 1204 (1972). As a result, the NBA owners came to realize that they could not unilaterally impose restraints which would violate the antitrust laws, and that an agreement with the players was in their best interests. A ten year class action settlement in the *Robertson* litigation, modifying the league's player restraints, was signed in 1976. This, in turn, led to the successful negotiation of companion collective bargaining agreements embodying, among other things, the terms of the *Robertson* class action settlement, which covered the 1976 through 1986 NBA seasons.

In 1982, the NBA clubs threatened to change unilaterally the *Robertson* system of player restraints to include a so-called salary cap system. The players filed a lawsuit in response under both the antitrust laws and the *Robertson* settlement agreement, which led to a Special Master decision that the owners could not impose such restraints unilaterally. *Lanier* v. *National Basketball Ass'n*, 82 Civ. 4935 (S.D.N.Y. 1982). Faced with this ruling, which prevented them from imposing any anticompetitive restraint they desired, the NBA clubs instead engaged in good faith negotiations, which culminated in a new salary cap/free agency system agreed to by the players and the NBPA in 1983. *See Wood v. National Basketball Assn'*, 809 F.2d 954 (2d Cir. 1987) (non-statutory labor exemption held to cover this system of restraints agreed to by the players' union).

At the end of the 1986-87 season, the NBA clubs again sought to impose anticompetitive labor market restraints without union agreement, renewing their argument for an expanded application of the non-statutory labor exemption. In response, a class of professional basketball players filed a new antitrust lawsuit, *Bridgeman* v. *National Basketball Association*, No. 87-4001 (D.N.J. 1987). Once again, it was only after the district court

rejected the clubs' blanket assertion of antitrust immunity (leaving the exemption issue open for factual findings at trial), that the owners and the players were able to negotiate a new seven year class action settlement, continuing the salary cap, but significantly increasing the free agency opportunities for players to market their services. This class action settlement, in turn, again made it possible for the players and clubs to agree upon a new seven year collective bargaining agreement, incorporating, among other things, the terms of the *Bridgeman* settlement.

The successful accommodation of antitrust and labor policy was disrupted when, on June 17, 1994, the NBA clubs filed a lawsuit against seventeen NBA players and a defendant player class in the United States District Court for the Southern District of New York, styled *National Basketball Association* v. *Williams,* No. 94 Civ. 4488 (KTD) (S.D.N.Y. 1994). The clubs sought to continue a set of labor market restraints without union agreement. A group of then-current and prospective NBA players counterclaimed under the Sherman Act. Thereafter, the United States Court of Appeals for the Second Circuit, affirming the result reached by the district court below, held that all labor market restraints imposed by the members of a multi-employer bargaining unit are exempt from the antitrust laws unless and until the workers in these markets decertify their unions. *See Williams*, 45 F.3d 684 (2d Cir. 1995).

As a direct result of the *Williams* decision, labor relations in the NBA were thrown into chaos. This past summer, the NBA experienced its first lockout in history, as the clubs insisted on anticompetitive restraints which they believed they could impose with antitrust immunity. At the same time, a heated election among NBA players was initiated before the NLRB to determine whether a majority of players wished to decertify the players' union in order to assert their individual antitrust rights against the clubs' unilateral imposition of player restraints. The

entire NBA season was jeopardized because the clubs threatened to continue their lockout indefinitely if a majority of players voted to decertify the union. In September, a majority of NBA players voted not to decertify their union and a new collective bargaining agreement was reached. However, the fact that the NBA clubs publicly opposed union decertification in order to protect their antitrust exemption illustrates how an overbroad interpretation of the non-statutory labor exemption can turn national labor policy on its head.

With respect to professional hockey, prior to the decision in *Williams* and the decision below, the antitrust laws were applied to labor market restraints unilaterally imposed by the NHL clubs at the same time that successful collective bargaining was taking place. For example, unilaterally imposed, unreasonable restraints on competition for hockey players were found subject to antitrust scrutiny in *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) and *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977). By contrast, when the NHLPA and the NHL clubs included certain player restraints in an unexpired CBA, the non-statutory labor exemption was held to apply. *See McCourt* v. *California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979). As a result, the labor market in professional hockey remained free from unilaterally imposed unreasonable restraints, while successful collective bargaining also took place.

The decision below apparently misconstrued the recent labor history in professional hockey as somehow supporting the view that collective bargaining is facilitated by the absence of antitrust protections for the labor market. *Brown*, 50 F.3d 1041, 1057-58 (D.C. Cir. 1995). In fact, this history illustrates the contrary point. After expiration of the last CBA in the NHL in September 1993, the NHL clubs made it clear that they wanted a new "salary cap" or salary tax to eliminate price competition for player services—a demand which the NHLPA and its

members strongly resisted. The NHL clubs, however, did not unilaterally impose a salary cap or tax—even after an impasse in the negotiations had been reached—because of their belief that the antitrust laws would apply.[4] Instead, the NHL owners resorted to a lock-out (an economic weapon not prohibited by the antitrust laws in a unionized industry) and a new CBA was eventually reached which did not include a salary cap or tax. The collective bargaining process worked only because the NHL clubs believed that the antitrust laws prohibited them from unilaterally imposing the new salary cap restraints they desired.

C. Professional Baseball

For more than a century, the clubs comprising the American and National Leagues operated under an agreement that, once a player entered into an employment contract with a particular club, he became the property of that club for the duration of his career or, at least, until his club no longer wished to employ him. That agreement, known as the "reserve system," precluded competitive bidding for players' services. And, because the clubs jointly had monopoly power in the market for players' services, the agreement also effectively fixed prices in that labor market. The legality of this multiemployer group's agreement to impose labor market restraints was challenged under the antitrust laws. But in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Flood* v. *Kuhn*, 407 U.S. 258 (1972), this Court held, in an acknowledged "anomaly," that Major League

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[4] Harry Sinden, the President-General Manager of the Boston Bruins admitted publicly to just these antitrust concerns, stating that "[a]t the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade." *See* Joe Gordon, *NHLPA Eyes Suit; Owners May Hear Antitrust Charge, Boston Herald*, December 25, 1994, at B24.

Baseball's nearly century old reserve system was exempt from scrutiny under those laws.

Profesional baseball thus provides the purest example of the unstable, disruptive labor relations that result when a multiemployer group believes itself to be operating in an area beyond the reach of the antitrust laws. Since July 1966, Major League baseball players have been represented by the MLBPA, an exclusive bargaining representative within the meaning of section 9 of the NLRA. There has been a work stoppage in each of the last eight collective bargaining negotiations between the clubs and the MLBPA—player strikes in 1972, 1980, 1981, 1985, and 1994-1995, and club lockouts in 1973, 1976 and 1990. And, at least since 1976, this conflict and disruption has been generated, virtually in its entirety, by the clubs' attempt to impose anticompetitive restraints in the market for players' services.

In 1976, Major League players for the first time successfully challenged the clubs' anticompetitive reserve system. Following a victory in arbitration, the players secured a limited right of free agency—that is, the right to offer their services on the market consisting of clubs in both leagues. *See In re The Twelve Clubs Comprising National League, et al.*, 66 LAB.CAS. 101 (1976) ("Messersmith Arbitration"). Since that time, believing the antitrust laws to be no barrier to their imposition of anticompetitive restraints in the labor market, the clubs have regularly attempted to roll back players' free agency rights and regain the power to fix or otherwise restrain prices in the market for players' services. Each time, the players and the MLPBA have strongly resisted, and disruptive confrontations have resulted:

• In 1976, the clubs locked out the players. Their goal was to re-establish the purity of the reserve system which had been lost in the *Messersmith* case and again to eliminate competition in the market for players' services.

• The player strikes in 1980 and 1981 were likewise caused by club initiatives designed to eliminate free agency and the resulting competition in the labor market. The clubs attempted to require that a club which successfully bid for the services of a free agent player "compensate" the player's former club for its loss with a player from the successful bidder's roster. The clubs also sought to eliminate individual salary negotiations and replace them with an industry-wide compensation schedule.

• In 1985, and again in 1990, the clubs proposed that players' compesnation be limited to a defined percentage of revenues—that is, the clubs proposed a salary cap system. Through this system, the clubs sought to restrict price competition in the market for players' services by artificially limiting the amount that each club was permitted to spend on player compensation. These attempts by the clubs to undermine free agency resulted in a brief player strike in 1985 and a lockout by the clubs in 1990.

• Finally, the player strike that began in 1994-1995 was the direct result of the clubs' renewed attempt to impose a salary cap system on the market for players' services, without the agreement of the union. The strike resulted in the cancellation of the 1994 post-season, including the World Series. There is still no collective bargaining agreement in Major League Baseball today.

The history of disruptive labor relations in baseball can thus be traced to the clubs' repeated attempts to use their monopoly power to eliminate or restrict competition in that market. The clubs made these attempts as a direct result of their perception that they are uniquely immune from application of the antitrust laws and that they can legally agree to and unilaterally impose on the market for player services whatever restraints they can obtain in a contest of strength. The stakes are high, so the clubs have a strong incentive to test the players' resolve on any occasion that presents itself and the players have

an equally strong incentive to resist. The result is a chaotic, hostile, nonproductive labor relationship that lurches from work stoppage to work stoppage, disrupting and damaging the careers of players, the business of baseball (and related businesses in the communities affected), and the welfare of consumers. By contrast, if the baseball clubs perceived that their unilateral agreement to and imposition of restraints would be subject to the antitrust laws, their labor relations, like those in other professional sports industries where the antitrust laws have been applied, would stabilize.[5]

II. ANTITRUST AND LABOR LAW POLICIES ARE PROPERLY ACCOMMODATED BY LIMITING THE NON-STATUTORY LABOR EXEMPTION TO TERMS OF EMPLOYMENT WHICH ARE CONTAINED IN UNION-EMPLOYER AGREEMENTS, ESPECIALLY IN INDUSTRIES IN WHICH INDIVIDUAL BARGAINING OVER SALARIES AND OTHER SIGNIFICANT TERMS OF EMPLOYMENT IS PRESERVED

The non-statutory labor exemption, which has been implied by this Court in order to effectuate the collective bargaining and union organizing objectives of the statutory labor exemption, is properly limited to restraints on substantive employment terms contained in union-employer agreements. Any broader antitrust immunity would contravene the Congressional intent manifest in the statutory labor exemption, and undermine antitrust and labor law policies. Indeed, in no industry is the need for this limitation clearer than in professional team sports, where salaries and other significant employment terms have always been set by individual negotiations between individ-

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[5] Indeed, even the President of the National Football League, Neil Austrian, recently stated in a television interview that baseball's antitrust protection "really precipitated and prolonged the [1994-1995] strike." *Moneyline* (CNN, December 7, 1995, Transcript #1565) (Appendix, p. 2a).

ual employees and employers. At the same time, the clubs in these sports have repeatedly sought to suppress competition among themselves over such contracts. There is no basis in national labor policy for implying an antitrust immunity for these competing employers, who cartelize their labor markets, to impose such anticompetitive restraints.

Congress has pasesd only one law granting antitrust immunity in the labor context. The statutory labor exemption is contained in those provisions of the Clayton Act [6] and the Norris-Laguardia Act,[7] which declare that labor unions are not combinations or conspiracies in restraint of trade and which specifically exempt certain union but not employer, activities from the reach of the antitrust laws. The "non-statutory" labor exemption was found by this Court to be implied from the statutory labor exemption and the need to protect certain union-employer agreements reached as a result of collective bargaining under the National Labor Relations Act. It "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 622 (1975). As this Court has explained:

> The basic sources of organized labor's exemption from the antitrust laws are §§ 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. They do not exempt concerted action or agreements between unions and nonlabor parties. The Court has recognized, however, that a proper accommodation between the congressional policy favoring

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[6] 15 U.S.C. § 17; 29 U.S.C. § 52.

[7] 29 U.S.C. §§ 104-105, 113.

> collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that *some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.*

Connell, 421 U.S. at 621-22 (emphasis added).

The proper scope of the non-statutory labor exemption was first fully articulated by this Court in *Jewel Tea, supra*, and *Pennington, supra*. A careful reading of these decisions confirms that union agreement is a necessary and critical prerequisite of the exemption.

In *Pennington*, a small coal operator alleged that the United Mine Workers had agreed with a group of large companies in the industry to impose a high wage scale on smaller, relatively labor intensive operators in order to drive them out of business. The union argued that such an agreement between a union and an employer was exempt from the antitrust laws. Writing for the Court, Justice White stated that a union has an implied non-statutory labor exemption from the antitrust laws to enter into labor agreements with a multiemployer bargaining group, and may, if acting in furtherance of the employees' interests, seek to enter into similar agreements with other employers. *Jewel Tea*, 381 U.S. at 665. The Court explicitly held, however, that the labor laws did not preempt the application of the antitrust laws and that the union had forfeited the protection of the non-statutory labor exemption by pursuing the anticompetitive interests of the employer group. *Id.* at 668-69.

By contrast, in *Jewel Tea*, issued the same day as *Pennington*, the Supreme Court applied the non-statutory labor exemption to shield a collective bargaining agreement designed to protect the interests of employees by limiting late night hours. Justice White, writing for Chief Justice Warren and Justice Brennan, set forth what have come to be recognized as the established parameters of the non-statutory labor exemption; no antitrust liability

shall attach to labor market restraints embodied in a union-employer agreement if those restraints advance legitimate employee goals in a labor market and restrain trade no more than is necesary to achieve those goals. *Jewel Tea*, 381 U.S. at 688-89.

In articulating the limited scope of the non-statutory labor exemption in these two cases, the Supreme Court expressly rejected the argument, set forth in Justice Goldberg's opinion (concurring in *Jewel Tea* and dissenting in *Pennington*) for three members of the Court, that *any* employer-union agreement concerning mandatory subjects of collective bargaining should be immune from antitrust challenge, even if the agreement primarily restricts competition in a product market and is designed to further the interests of employers, not employees. As Justice White explained:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. . . . [T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

Jewel Tea, 381 U.S. at 664-65. Thus, a majority of the Court refused to extend the non-statutory labor exemption even to restraints contained in union-employer agreements which primarily advance anticompetitive employer interests, let alone to employer restraints being imposed without any union agreement at all.

Fundamental principles of statutory interpretation set forth by this Court, which only permit an antitrust exemption to be judicially implied to the minimum extent necessary, and then only where there is a "clear repugnancy" between the antitrust laws and a competing statute, under-

score the fact that the scope of the non-statutory labor exemption for restraints on substantive employment terms, must be limited to those restraints contained in union-employer agreements. *See, e.g., National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388 (1981); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). As this Court has ruled, there is nothing in the legislative history of the NLRA which would justify a broad implied pre-emption of the antitrust laws from unionized labor markets. *See Connell*, 421 U.S. at 634 ("[t]here is no legislative history . . . suggesting that . . . Congress thought allowing antitrust remedies . . . would be inconsistent with the remedial scheme of the [labor laws]"), *see also Pennington*, 381 U.S. at 668-69.[8]

Certain union-employer agreements are afforded an implied, non-statutory antitrust immunity only because it is essential to do so in order to preserve a union's statutory ability to engage in collective bargaining, *i.e.*, both parties to a labor agreement must be protected from antitrust liability for entering into such agreements if any meaningful bargaining is to take place. By contrast, a broader immunity for restraints unilaterally imposed by employers is clearly not necessary to resolve any "repugnancy" between antitrust and labor policy. As this Court held in an early labor-antitrust dispute: "[B]enefits to

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[8] To the contrary, as repeatedly explained by this Court, the existence of federal labor law rights does not create a blanket immunity for employers from other federal or state statutes:

> Nor has Congress *ever* seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards. . . . It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724, 755-56 (1985) (emphasis added). *See also, Livadas* v. *Bradshaw*, 114 S. Ct. 2068, 2081 (1994); *Fort Halifax Packaging Co.* v. *Coyne*, 482 U.S. 1, 20-22 (1987).

organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Applying these principles, the entire rationale for implying a limited antitrust immunity for restraints on substantive terms of employment contained in certain union-employer agreements disappears when the restraints are being unilaterally imposed by employers. In that situation —which is clearly presented here—the fundamental policy underlying the statutory labor exemption—to protect the rights of employees to act in combination and bargain collectively—would be undermined, rather than furthered, by permitting employers to shield their unilaterally-imposed restraints from antitrust scrutiny.

This limited scope of the non-statutory labor exemption is particularly warranted in industries like professional team sports and entertainment, where, unlike in manufacturing industries, unions have always preserved for their members the right to individually negotiate salaries and other significant terms of employment. As this Court recognized long ago:

> where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours *or expressly to leave certain areas open to individual bargaining.*

J.I. Case Co. v. Labor Board, 321 U.S. 332, 338 (1944) (emphasis added). This is precisely the situation in professional team sports, where the great variation in the circumstances and abilities of individual players has caused unions to preserve for their members the right to individually negotiate their contracts. The employers in these industries understandably desire to eliminate competition among themselves over such contract terms, but there is nothing in the NLRA which grants them anti-

trust immunity to unilaterally impose such anticompetitive restraints.

Nor is there any merit to the argument adopted by the Court of Appeals below that confining the non-statutory labor exemption to terms of employment agreed to by a union would impede collective bargaining by giving too strong a weapon to employees. First, all that multi-employers need to do is to comply with the rule of reason and the antitrust laws in implementing their proposals [9]—just as they must comply with antiduscrimination, health, safety and other laws in implementing terms of employment. Second, employers in a multi-employer bargaining unit are free to engage in lockouts and similar tactics directed at securing a CBA as long as a union is in place. *See Brown*, 50 F.3d at 1066-68 (Wald, J., dissenting).[10] As the experience in professional team sports demonstrates, applying the antitrust laws to unilaterally imposed labor market restraints simply levels the playing field so that stable and productive collective bargaining can take place.

In sum, this Court should reverse the decision below, as well as the holdings in *Williams* and *Powell*, to make it clear that the non-statutory labor exemption is dependant upon continued union agreement and that employees do not have to decertify their unions to assert their antitrust rights. By doing so, the Court will be adhering to basic principles of statutory construction and judicial restraint and effectuating both antitrust and labor law policies.

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[9] *See Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) (reasonable restraints survive antitrust scrutiny).

[10] Tactics such as a lockout are particularly powerful weapons for employers in professional team sports because the careers of professional athletes are extremely short, usually lasting only a few years.

CONCLUSION

For all of the above reasons, as well as those stated in the Petitioners Brief, this Court should reverse the judgment of the Court of Appeals.

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January 19, 1996

APPENDIX

APPENDIX

Moneyline (CNN) December 7, 1995
Transcript #1565

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NFL PRESIDENT CHEERS CURRENT PRO FOOTBALL CONDITIONS

LOU DOBBS, Anchor: The NFL now facing the major vacancy in Los Angeles and the prospect of disappointing its loyal fans in Cleveland. What can the league do to bring back a measure of stability? The question tonight for my guest the president of the NFL Neil Austrian.

Neil, good to have you with us.

NEIL AUSTRIAN, President, National Football League: Nice to be here, Lou.

LOU DOBBS: I think we should start at the out set by pointing out that while there's a great controversy surrounding teams moving, a lot about players' pay and so forth, you guys aren't doing too badly financially, are you?

NEIL AUSTRIAN: No, I think this will be a record year for the National Football League. We're into the second year of the largest television contract in sports history with five networks. Our occupancy rate, or fan interest, in the sport has never been higher as evidenced by our ratings on television and by attendance in the stadiums. It'll be a good year.

LOU DOBBS: A reasonable backdrop on my thing for NFL executives to say—well if we're going to move teams this is the year to do it. Does that play any part in those decisions?

NEIL AUSTRIAN: It doesn't any part at all. I think the reality is that we've had franchise stability until this year to a great extent, and we view it on that basis.

There's a couple of new realities though that are facing teams.

LOU DOBBS: Right.

NEIL AUSTRIAN: One is escalating player costs and the other is the sort of Damocles of anti-trust legislation where cities who don't get teams threaten to sue us, and I think if you look back in the '80s, we fought the Raiders from moving from Oakland to Los Angeles.

LOU DOBBS: One of the great—one of the great fights in sports history.

NEIL AUSTRIAN: It was. It was a great fight unless you had to pay the piper, and it cost us $50 million to do it. Commissioner Tagliabue was in Washington last week talking with a congressional committee about proposals for new limited anti-trust exemption whereby the league if it intended to try and to have realistic standards for franchise relocation couldn't be sued.

LOU DOBBS: This coming at a time, though, in all reality, in which Congress is looking more at the prospect of removing baseball's anti-trust exemption rather than applying it to other sports. At least that's my understanding of the mood on Capitol Hill.

NEIL AUSTRIAN: To some extent, but I think that what we're talking about is not an anti-trust exemption for labor, which is what baseball's enjoyed—

LOU DOBBS: Right.

NEIL AUSTRIAN: —and which really precipitated and prolonged the strike. We don't want one in labor. We really just it on relocation and the ability to interpret and administer our own internal rules.

LOU DOBBS: Your ratings are up. Your revenues are up. Cleveland is up in arms. Baltimore is obviously rejoicing. Are we going to see more of this, a la Houston and moving to Nashville, that sort of thing?

NEIL AUSTRIAN: Well, as I said earlier, I think that the new reality really is that player costs have escalated dramatically. Under our new salary cap that was negotiated in '93, cash is king. Teams that have excess cash from non-shared revenue, which is stadium revenue, have the ability, as Jerry Jones did, to go out and pay large signing bonuses both to keep their own team and to attract free agents. So, what you have right now is decaying stadiums and a scenario where teams are really facing a different set of economics.

LOU DOBBS: So, you're suggesting that Jerry Jones' model might be the model of the future?

NEIL AUSTRIAN: Not at all.

LOU DOBBS: I didn't think so.

NEIL AUSTRIAN: Not at all.

LOU DOBBS: Well, that situation in which he is so—calling you a cartel. What is going to be the outcome there?

NEIL AUSTRIAN: Basically, we sued Jerry to start the process, given what we really felt was egregious behavior in terms of breaking faith and some commitments he had with NFL properties. The simple fact is Jerry says the pie is going to grow if every team markets their own logos and marks. The pie is not going to grow. This is really about money. Jerry and the Dallas Cowboys have the largest revenue in the league by significant measures.

LOU DOBBS: Right.

NEIL AUSTRIAN: He doesn't want to share it and would like to increase it. He wants a greater share of the pie. When you think of what NFL properties does in terms of the benefits for all its member clubs, marketing a club, but more than that, Lou, marketing the league. We're national. We're not local.

LOU DOBBS: He owns the stadium, however.

NEIL AUSTRIAN: Correct.

LOU DOBBS: Other owners don't. That's—but that's an economic and business advantage that he should—should he not enjoy and take advantage of?

NEIL AUSTRIAN: The league was founded on some revenue sharing principles. When I go back and look what happened in the late '50s and early '60s, when the Maris [*sp.*] from New York, when the Halas in Chicago, when Art Modell [*sp.*] in Cleveland when the Redskins all gave up their own television contracts and said we'll turn it back to the league and share equally, that's the principle the league was founded on.

LOU DOBBS: Right.

NEIL AUSTRIAN: That's what promotes the great competition we've got on the field.

LOU DOBBS: And it doesn't sound like quick resolution as between the NFL and Jerry Jones and it sounds like a future with not great stability for a lot of teams.

NEIL AUSTRIAN: I'm not certain about that. I think we had a very good meeting today with Mayor White and the people from Cleveland and I think we might—might well work toward some resolutions.

LOU DOBBS: Favorable to Cleveland?

NEIL AUSTRIAN: At this point we haven't finished with their application in terms of why they want to move and we've got a lot more work to do with Cleveland before we can answer that.

LOU DOBBS: So, that deal is far from done?

NEIL AUSTRIAN: That's correct.

LOU DOBBS: All right. Neil Austrian, thanks for being with us.

NEIL AUSTRIAN: Thank you, Lou.